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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. ~~107~~

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONER.

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January 9, 1950.

INDEX.

	PAGE
I. Meeting in Good Faith an Equally Low Price of a Competitor—The Proviso to Section 2(b)	1
II. Constitutionality	8
Vagueness	9
Unreasonableness	10
III. Paragraph 6 of the Order	12
IV. The Purchases Were Not in Commerce	14
Conclusion	15

List of Authorities Cited.

Cases:

Central Lumber Company v. South Dakota, 1912, 226 U. S. 157 11

Corn Products Refining Co., et al. v. Federal Trade Commission, 1945, 324 U. S. 726 12

Fairmont Creamery Co. v. Minnesota, 1927, 274 U. S. 1 11

Federal Trade Commission v. Cement Institute, et al., 1948, 333 U. S. 683 12

Federal Trade Commission v. Morton Salt Company, 1948, 334 U. S. 37 ..... 6, 7

Federal Trade Commission v. Staley Manufacturing Co., 1945, 324 U. S. 746 7

State v. Fairmont Creamery Company of Nebraska, 1911, 153 Iowa 702, 133 N. W. 895 11

Walling v. Jacksonville Paper Company, 1943, 317 U. S. 564 ..... 14, 15

Other Authorities:

Adelman, M. A., "Integration and Antitrust Policy," 63 Harvard Law Review 27, November, 1949 ..... 10, 11

Constitution and Statutes:

U. S. Const. Amend. V 8

Clayton Act, as amended by the Robinson-Patman Act, Sec. 2(a) and (b), 49 Stat. 1526 (1936); 15 U. S. C. Sec. 13(a) and (b) (1946) 6, 7, 9, 10, 12-14

Sherman Act, 26 Stat. 209 (1890) as amended; 15 U. S. C. Secs. 1, et seq. (1946) 14

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I.

eting in Good Faith an Equally Low Price of a Competitor—The Proviso to Section 2(b).

(a)

The Commission now asserts (Com. Br., pp. 44-7) that its ncession with respect to petitioner's good faith meeting equally low prices of competitors was "only for the purse of this decision" and was not "a concession of actual t." Its brief concludes with a plea in the alternative t the case be remanded to the Commission for a finding the good faith issue for, it is suggested, that the Commission might on remand adopt a more "vigorous" view good faith.

This is not a case in which the Commission, having mutu-

ally exclusive grounds of decision, and having acted upon one of those grounds, found it unnecessary to consider the other. In this case the good faith defense was one of the principal defenses offered by petitioner. Voluminous evidence was taken upon it. The Trial Examiner who heard and saw the witnesses found the issue in petitioner's favor, and the Commission, although it made no formal finding, did, in fact, consider the issue and must, in fact, have accepted the Trial Examiner's finding; the grounds upon which it placed its decision were predicated upon the assumption that petitioner had proved its good faith defense. And it stands to reason that the Commission would hardly have strained to adopt what is admittedly a novel, previously unheard of, interpretation of the statute which would nullify the effect of the good faith showing, unless it had first reached the conclusion that that showing had been made.

If the Commission had been of the opinion in 1944 when the factual issue was presented to it that the good faith defense had not been proved, it would have been a simple matter to dispose of the case on that issue. The only reasonable conclusion from all the circumstances is that the Commission in fact concluded that good faith defense had been affirmatively proved. The technicality of the absence of a formal finding would not justify the resubmission of this case to the present Commission after all these years for what in substance would be a reconsideration of the issue of good faith, in order that it may now, as counsel appear to anticipate, adopt a "more vigorous" construction of that provision of the statute. Presumably, counsel, consistently with the argument in the present brief, will urge upon the Commission that the statutory injury to competition is in itself inconsistent with the good faith defense of meeting competitors' prices.

The fragmentary treatment in the Commission's brief

of the voluminous testimony in the record on the subject of meeting lower competitive offers, is not only considerably less than complete but is, we believe, inappropriate.

Commission's brief makes no mention of the fact that petitioner, prior to the initiation of these proceedings, supplied seven jobbers but lost three of them on account of failure to meet lower offers from competitors. It omits mention of the uncontradicted testimony of petitioner's witnesses that petitioner could not have hoped to keep any of its remaining four jobbers unless it had sold to them at the tank car price (R. 947-51, 1062-3, 1086, 1092, 344-5, 1843), a fact which is recognized by the Trial Examiner (5098-5104) and also by the Commission in its Findings of Fact (R. 5179); or the testimony of another witness that the 1½¢ jobber margin allowed by petitioner was the smallest such margin allowed to jobbers anywhere (R. 951).

Austin, now counsel for the retailers *amici*, then representing the Commission, said in his brief filed with the Commission:

> "It is conceded also that the evidence is to the effect that during the time in which respondent has sold to Citrin-Kolb and Ned's at tank car prices, it has done so in the belief that it could not hold the business of these customers at higher prices." (Brief of Attorney for Commission, Docket No. 4389, p. 47.)

The Commission itself in its Findings of Fact immediately preceding the excerpt quoted in the Commission's brief at page 23 recited (R. 5179) petitioner's contention, without questioning its validity, that:

> "* * * the lower prices allowed the four dealers were made in good faith to meet an equally low price of a competitor for the reason that said four dealers could at any time herein involved have purchased gasoline of grade and quality comparable to that sold by the respondent at equally low or lower prices from other suppliers in Detroit."

In the court below petitioner, for the enlightenment of the court, also set forth in its brief a representative portion of the evidence relating to specific offers of specific competitors of comparable gasolines in order to demonstrate that the Trial Examiner's finding was indisputable* (Pet. Br. below, pp. 11-18). The Commission's brief below contained not one word in opposition; its silence, we submit, constituted a complete and final waiver of this factual question. The opinion of the court below indicates that it had examined the evidence and it held that there was "substantial evidence in this record" and "we think it may be assumed to be conclusive" that the lower price to the four jobbers was in each instance made in good faith to meet an equally low price of a competitor (R. 5297; see also R. 5299, 5302). This finding by the court below would likewise seem to be conclusive.

The Commission would hardly have been warranted in passing over the issue of the good faith defense and in presenting its case to the Court on the grounds now being mooted unless it had first satisfied itself with respect to the good faith aspect. The late Walter B. Wooden, counsel for the Commission, said in his argument before it on April 25, 1946:

> "With some trepidation I now approach what is by all odds the most difficult and in many respects the most important issue in the case. * * *
>
> "That issue concerns the legal and possibly the constitutional status of respondent's defense under Section 2(b) as to meeting an equally low price of a competitor in good faith.
>
> * * * * * *
>
> "The Commission has seen fit to treat it as not an absolute substantive defense in this case, for reasons

*For the convenience of this court we have caused to be filed with the Clerk certified copies of the briefs in the court below.

set forth in paragraph twelve [R. 5178-82] of its findings. *The Commission there described the evidence offered by respondent on the question of good faith to meet an equally low price of a competitor, and apparently no evidence controverting it was offered.*

"Desiring to test the legal status of such defense, the Commission found that it was not material as a matter of law whether such defense could be sustained as a matter of fact under the circumstances of this case. Accordingly, it made no finding on the factual question.

"The result, I suppose, is the same as though the existence of the respondent's good faith to meet an equally low price of a competitor had been conceded." (Emphasis ours. Pp. 100-1 of Official Report of Oral Argument before Federal Trade Commission, Electreporter, Inc., Official Reporter.)

It is apparent to us, as it was apparent to Wooden, that the Commission considered the showing to have been fully established and conceded.

The Commission thus seeks at this late date to take advantage of its own deliberate omission to make a formal finding in respect of an issue which was fully settled.

(b)

A remarkable omission in the Commission's brief is its failure to reply to our contention that if the good faith defense is not available in the instant case it will be unavailable in every price discrimination case (Pet. Br., pp. 35, 36).

Counsel now plainly assert that the good faith defense is unavailable when the Commission has proved statutory injury to competition at the purchaser level, *i. e.*, when the Commission has proved a difference in price to competing

purchasers more than *de minimis** (Heading to Point I, Com. Br. p. 21; See also p. 35).

While they contend that the good faith showing will rebut the Commission's "*prima facie* case", this showing in turn will be surrebutted and nullified, they maintain, if the Commission should "show by additional and affirmative evidence that the effect of the discrimination may be to substantially lessen competition, etc." They fail, however, to point out wherein their surrebuttal would differ from the "*prima facie* case", in the light of the *Morton Salt* case, which holds that a showing of a discrimination in price between competing purchasers not only makes out a *prima facie* case but also a complete case for the Commission, in the absence of any proof of justification.

Furthermore, in order to develop their fine-spun argument the Commission is compelled to maintain that different meanings should be given to the same words when they are repeated in the same section of the same statute. "Rebutting the *prima facie* case" in Section 2(b), according to the Commission, means completely and finally rebutting the case, where the same words in the proviso to Section 2(b) contemplate a provisional rebuttal which is subject to surrebuttal by the introduction of additional evidence. Likewise the Commission's theory necessarily accords to the phrase "discrimination in price" a meaning in Section 2(b) which is much less comprehensive than the meaning ascribed to the same phrase in Section 2(a) (Com. Br. pp. 35-6). Finally, the word "justification," admittedly meaning a complete and final justification with respect to the matters set forth in the proviso to Section 2(a), is con-

* At other places in the brief, counsel refer to actual injury and affirmative proof of injury, suggesting that they perhaps believe that the type of evidence held to be unnecessary and redundant in the *Morton Salt* case will fortify their position (Com. Br. pp. 24, 35, 36, 37; Pet. Br. p. 39).

strued by the Commission as merely a provisional justification with respect to the good faith defense in the proviso to Section 2(b)—which flies directly in the face of the opinions of this Court in the *Staley* and *Morton Salt* cases (Pet. Br. pp. 24-5).

Nor is there any warrant for the assertion that the grounds of justifications set forth in Section 2(a) constitute matters in confession and avoidance and a complete defense, but that the justification referred to in the proviso to Section 2(b) is limited to a traverse of the Commission's proof of effect on competition (Com. Br., pp. 34-44). All of the provisos are introduced in the same language and all of them clearly provide defenses in confession and avoidance.

It is palpably absurd, also, to urge that proof of good faith in meeting a competitor's price can serve in this case only in so far as it tends to show that adverse effects on competition have not occurred (Com. Br. pp. 34-44), and at the same time to contend that such proof "does not logically rebut" (Com. Br. p. 37) and "does not preclude" the reasonable probability (Com. Br. p. 43) that competition has been adversely affected.

The tortuous arguments (Com. Br., pp. 38 *et seq.*) with respect to criminal motive and criminal intent are beyond our comprehension. We nowhere suggested that subjective intent or motive or "a pure heart" has any bearing on a price discrimination case.

To rationalize their disregard of well-settled tenets of statutory construction, counsel have been compelled to seize upon and embellish selected Congressional utterances and reports which we submit are not representative of the compromise finally enacted (Com. Br. p. 27 *et seq.*; Pet. Br. p. 23); nor have they shown that the results which they seek would either be desirable or warranted, inasmuch as

there is no question but that if petitioner is compelled to cut off its four jobbers, they could and would buy from other suppliers at prices as low as, or even lower than, petitioner's prices.

II.

Constitutionality.

Instead of replying to our contentions based upon the due process clause, the Commission's brief contents itself with knocking down straw men largely of their own creation. The discussion (Com. Br., pp. 49-51) of procedural due process is entirely irrelevant; and whereas our arguments were directed to whether the Commission's construction of the present statute is consistent with the requirements of the Fifth Amendment, the Commission has preferred to discuss the academic question whether Congress could under any circumstances deny the right of a seller to meet in good faith the lower price of a competitor.

Whether or not a statute would be valid which in terms barred any price discrimination, regardless of the good faith meeting of the lower price of a competitor, we maintain that a statute under which the good faith defense "may or may not be applicable" (Com. Br., p. 32), depending on the mere whim of the Commission, must fall for indefiniteness (Pet. Br., pp. 36-40). Likewise the statute would be invalid, as being arbitrary and capricious, where its application, as contended for by the Commission in this case, would be a futility so far as carrying out any of the purposes with which the statute is concerned and where the sole effect is to bar dual distribution and to cause unwarranted injury to jobbers who have built up their businesses around the brand names of suppliers engaged in dual distribution (Pet. Br., pp. 40-44).

Vagueness.

The Commission in its brief abandons the "rare" case concept, which was employed to mollify the Congressional Committee. It now apparently acknowledges, as logically it must, that the only injury with which the statute is concerned is the statutory injury described in Section 2(a), and that under its theory the good faith defense would fail in every case where this injury is made out, which means, as we urged in our main brief, in every price discrimination case (Pet. Br., pp. 39-40).

The further intimation of the Commission that proof of good faith meeting of the lower price of a competitor is not a defense in any event but solely a matter of "evidence" or "mitigation" (Com. Br., p. 39), where there is no indication whatsoever as to what weight, if any, is to be given to such evidence, or what the evidence would be in mitigation of, serves only to confirm that the Commission considers that the applicability of the Section 2(b) proviso is a matter of grace to be administered by the Commission as it may choose.

Nor is the Commission's position aided by the alternative suggestion that the good faith defense would be applicable only if it "logically" rebutted the Commission's proof of injury to competition (Com. Br., pp. 17, 37). The fact that the favored customer was bound to receive the lower price in any event, where good faith has been shown, so that the meeting of the lower price would not affect the competitive situations of the parties concerned, might well be deemed to rebut proof that the injury was caused by the price discrimination. But if this proposition be unacceptable, then good faith meeting of competition can never rebut the Commission's *prima facie* case, and the proviso to Section 2(b) becomes a nullity, rendering the meaning of the statute as we contend, hopelessly vague and indefinite.

Unreasonableness.

As previously indicated, it does not avail the Commission to argue that Congress, if it should legislatively find that price discriminations constitute an evil which should be eradicated by outlawing all price discriminations regardless of the good faith meeting of the lower price of a competitor, might constitutionally enact such a statute. As pointed out in our main brief, not only has Congress made no such finding but the retention of the proviso in Section 2(b) negatives any purpose of Congress to nullify the good faith defense. Under these circumstances, we maintain that it is arbitrary and capricious to apply the statute, as the Commission would in this case, so as to deny the good faith defense with the sole result of eliminating dual distribution, where there is no indication or any reason to believe that either competition or competitors will be benefited (because the same customers will pay the same prices anyhow), but where the dual distributors and particularly those purchasing from them will be seriously harassed.

We are charged (Com. Br., p. 61) with a "bold assertion of a constitutional right to discriminate in price to meet an equally low price of non-discriminating competitors despite the destruction of such competitors and the death of competition* itself which may ensue." This

*That such hyperbolic phraseology as "death of competition" and, from the opinion below, "havoc" and "bludgeon" go beyond the actual facts of this case, is commented on by M. A. Adelman, "Integration and Anti-trust Policy," 63 H. L. R. 27, 71:

> "One has visions of ruinous competition, of heads rolling, of prices cut 'until some of those fellows have gone bankrupt. When you cause that, I think that isn't clean competition.' Here, from the FTC's brief [the Commission's brief in the court below], is the extent of this ruthless annihilation:
>
> '*Many of the dealers* who testified as witnesses

somewhat startling characterization of our position is hardly supported by the actual fact that petitioner is simply seeking the privilege of holding four of its own long-time customers by selling to them at prices no lower than those offered to them by other suppliers. Far from seeking to aggrandize itself at the expense of competitors, petitioner is seeking solely to protect the business that it already has. In view of the further fact that the court below, after reviewing the evidence, confirmed petitioner's good faith, the attempted comparison of petitioner's practices in this case with the local price-cutting practices of "the old Standard Oil Company" is an unworthy effort of Commission's counsel to provide color otherwise wholly lacking in the Commission's case.

It is because the good faith showing of meeting a competitor's price presupposes *ex hypothesi* that the so-called "favored" customer would have received the price in any event, that we believe that the decision of this Court in the *Fairmont Creamery* case, 1927, 274 U. S. 1, retains its validity. *Central Lumber Company* v. *South Dakota*, 1912, 226 U. S. 157, and *State* v. *Fairmont Creamery Company of Nebraska*, 1911, 153 Iowa 702, 133 N. W. 895, cited by the Commission, are both distinguishable because the statutes in those cases dealt with discriminations where there was a specific intent to injure competition. Nor can the "possibility" of injury to com-

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for the Commission stated that Ned's stations were the first Standard Oil stations to cut prices in their respective neighborhoods, and that in the Fall of 1937 and the Spring of 1938 *they lost many customers* who told them that they were buying their gasoline at Ned's * * *.'"

To this statement Adelman appends a footnote as follows:

"If the skeptical reader suspects that the FTC had any stronger examples or evidence, I would beseech him to read the Brief and the Findings."

petition, with which the Robinson-Patman Act is concerned, be treated on a parity with those state statutes which depend upon a showing of purpose or intent to injure competition. Nothing in the *Cement* and *Corn Products* cases cited by the Commission can be considered to support the Commission's position that all price discriminations may be outlawed since the Court in those cases recognized the right to meet competition in good faith.

III.

Paragraph 6 of the Order.

Counsel attempt to sustain Paragraph 6 of the Order, which restricts the jobbers *as wholesalers*, by insisting that the Paragraph is merely a necessary enforcing or supplemental measure to make effective those portions of the Order which relate to sales to the jobbers *as retailers*. They say at pp. 70-1:

> "If the prohibition contained in Paragraph 6 were not included in this order there would be nothing to prevent Ned's, solely a retailer, from transferring its business to Citrin and purchasing Red Crown gasoline from Citrin at 1¢ a gallon below the tank-wagon price, delivered at Ned's stations. Ned's would obtain substantially the same competitive advantage over other retailers which it now obtains by purchasing in tank-car quantities from petitioner. Petitioner would achieve the same result which it now obtains, merely using Citrin as a conduit for sales to Ned's." (See also Com. Br., 19, 69.)

But it is obvious that petitioner could not, without violating Paragraph 5, afford a lower price to Ned's as a retailer by colluding to use "Citrin as a conduit"; hence it is obvious that Paragraph 6 is not necessary as an enforcing measure.

Furthermore, counsel proceed to discuss Paragraph 6, not as a supplemental enforcing measure but as the remedy for an additional purported substantive offense, for they say in effect at page 68 that if petitioner sells to wholesalers in tank car quantities at 1½¢ a gallon below the price it charges retailers in the same territory and if the wholesaler passes along a part of this wholesale margin to his retailer customers by selling at less than petitioner's posted tank wagon prices, then there is a violation of Section 2 of the Clayton Act as amended (Com. Br., p. 68). But whether Paragraph 6 is designed merely to strengthen Paragraph 5 or whether it is designed to prevent some additional purported substantive offense, it cannot be justified for reasons set forth in petitioner's main brief.

Nor is it true, as stated at page 69, that, "Apparently, petitioner's objections to Paragraph 6 go only to the terms of that paragraph." True, we pointed out that Paragraph 6 must be doctored up again—to permit the wholesalers to meet the competition of other wholesalers or of suppliers who will try to lure their customers away (Our Br. pp. 47-8).* But we deny that the sale at the tank car price to wholesalers and at the tank wagon price to retailers in the same territory constitutes in and of itself a discrimination in price forbidden by the Robinson-Patman Act; and the Commission has been unable to point to any authority so holding. We furthermore contended and still contend that there was no violation because the tank car price afforded each of the jobbers was afforded them in good faith in order to meet an equally low price of competitors, and also because the purchases alleged to be discriminatory were not in commerce.

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*E. g., see R. 883-8, 893-4, for lower offers of competitors made to Langer-Cohn and another customer of Citrin.

IV.

The Purchases Were Not in Commerce.

The failure of the Commission to find that "either or any of the purchases involved" were "in commerce," noted by the dissenting Commissioner (R. 5628-9) and pointed out in our brief (p. 56), is ignored in the Commission's brief. Not only is no explanation offered of the absence of this jurisdictional finding, but counsel seek to avoid the express limitation of Section 2(a) of the Clayton Act to transactions "in commerce" by urging the relationship between the Clayton Act and the Sherman Act. But, however much the Sherman and Clayton Acts may be in *pari materia* in other respects, it is perfectly clear that Congress did not choose in Section 2(a) of the Clayton Act to exhaust its power under the commerce clause. Sherman Act cases are therefore not determinative in construing the meaning of "in commerce," as used in the Clayton Act.

Counsel, recognizing that *Walling* v. *Jacksonville Paper Company*, 1943, 317 U. S. 564, relied upon by petitioner, is controlling, makes a vain attempt to fit that case into its argument on the commerce point. In the first two categories of goods there involved, interstate commerce was held to continue beyond the local warehouse, but in the third category, alone pertinent here, the interstate movement was held to have terminated at the local warehouse. It is necessary only to describe the first two categories to demonstrate the futility of the Commission's effort to fit the facts of the present case into either of them.

The facts with respect to the first category of goods involved a virtual subterfuge in order to avoid the Fair Labor Standards Act. Goods which previously had been delivered from the railroad terminal directly to specific customers, were formalistically unloaded into the warehouse, checked,

reloaded and promptly sent on to the customer. This "ritual" was held not to supply a break in the interstate movement. The second category concerned goods prepared especially for particular customers and ordered pursuant to pre-existing contracts or understandings. Such importation of particular merchandise for specific customers was held to remain interstate to and including the delivery to the customers in question.

There is no suggestion that any particular gasoline in the present case was brought into the State of Michigan for specified customers. All the gasoline brought into the state and stored in petitioner's marine terminal was available for eventual sale and delivery within the state to any and all customers using the various grades of gasoline. Only half of the gasoline stored at the marine terminal was sold to the jobbers and retail dealers with which this case is concerned (Com. Ex. 87, R. 4776). While petitioner's employees were able to estimate in advance the approximate needs of petitioner's customers collectively, there is no indication that any particular quantities of gasoline were stored for particular classes of customers. Consequently, while the Commission's brief quotes at length from portions of the Court's opinion concerned with the first two categories of goods involved in the *Jacksonville* case, it is quite apparent that it is only with respect to the third category of goods, as to which commerce was held to have terminated at the warehouse, that the *Jacksonville* case is analogous to the case at bar.

Conclusion.

All the zeal and ingenuity of Commission counsel cannot obscure the fact that this case is, after all, concerned only with whether petitioner may lawfully seek to retain four of its long-time customers by meeting in good faith the lower offers made to them by competitors. Although coun-

sel would picture these customers as "mass buyers" who could exact price reductions by their sheer size, actually they are typical small businessmen comparable with the 126 other jobbers in Michigan and the 12,000 or more jobbers throughout the United States, all of whom buy at the tank-car price. If petitioner were forced to cut them off, they would buy at the same or lower price from other suppliers.

It is submitted that the Solicitor General has not participated in the presentation of this case (Com. Br. p. 86) for the reason that the Department of Justice (as pointed out in our main brief, pp. 32-4, 56-7) does not agree that the public interest will be served by preventing one from retaining his customers by meeting in good faith the prices offered them by competitors or that Paragraph 6 of the Order is consonant with the Department's over-all administration of the antitrust laws.

For the reasons stated, the judgment below should be reversed without remand and the complaint dismissed.

Respectfully submitted,

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